

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426
21 CVS 500085

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, et al.,

Plaintiffs,

vs.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House
Standing Committee on Redistricting, et al.,

Defendants.

REBECCA HARPER, et al.,

Plaintiffs,

vs.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House
Standing Committee on Redistricting, et al.,

Defendants;

COMMON CAUSE, INC.,

Plaintiff,

vs.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House
Standing Committee on Redistricting, et al.,

Defendants.

**LEGISLATIVE DEFENDANTS'
RESPONSE TO *HARPER*
PLAINTIFFS' SECOND MOTION
TO COMPEL RESPONSES
TO SECOND SET OF
INTERROGATORIES
AND FIRST SET OF
REQUESTS FOR PRODUCTION**

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph E. Hise, Senator Paul Newton, Speaker Timothy K. Moore, and Representative Destin Hall (collectively, “Legislative Defendants”), by and through undersigned counsel and pursuant to this Court’s December 13, 2021 Scheduling Order and Rules 7(b), 33(a), 34(b), and 37 of the North Carolina Rules of Civil Procedure, and hereby respond to *Harper* Plaintiffs’ Second Motion to Compel Responses to Written Discovery. Legislative Defendants show the Court as follows:

Harper Plaintiffs move to compel production from Legislative Defendants for so-called “concept maps,” and threaten sanctions, but they had an opportunity to exhaust their deposition questions on the topic and in fact know Legislative Defendants have nothing further to produce. Rep. Hall testified at length during his seven-hour deposition on Monday about all potential sources of input in his map-drawing process.¹ He testified that drawing the 120-seat House plan took time and had difficult areas where population requirements made complying with neutral districting criteria challenging.² He testified that to hasten the process of finding solutions for this challenge—considering the time constraints the map-drawers were under—he relied on a staff member who sketched out options.³ Rep. Hall was clear that he was committed to the governing

¹ See, e.g., Draft Transcript of December 27, 2021 Deposition of Rep. Destin Hall (“Hall Tr.”), attached as Exhibit D to the *Harper* Plaintiffs’ Second Motion to Compel, at 116:15-159:6.

² *Id.* 116:15-23; 120:22-122:3.

³ *Id.* 120:22-122:3 (“You know, initially I just you know was simply going in and drawing you know starting with the one county groupings and moving on to county and so on and so forth but as you get into the process it’s more and more difficult to draw these maps it just takes longer just by you know the sheer number of districts that must be drawn, and so with our tight timeline, you know, it became clear we were not going to have time for me to just sort of go in there and figure it out, you know, without any sort of plan at all in drawing these districts. So again, knowing that because what the board of elections had told us we had to have these maps done really by early November I look at the timeline there was no way we were going to be able to finish. At the same time I wanted to draw a congressional map as well and of course the Senate has three chairs, and their Senate maps are, they don’t take as long to draw as the state House map, and so you know they could essentially finish their state Senate map or at least their proposed map and they were working on congressional maps and I wanted to be able to do some of that as well on the House side. So you know that, that was the purpose of the, of having staff work on concepts you know again with just giving a heads up of hey here’s where a given city is we want to keep cities whole; we want to keep a school maybe, you know, we want to keep a college or some university together. That way

redistricting criteria and racial and partisan data never entered the picture;⁴ this exercise of sketching out options was solely focused on the mechanics of dividing population.⁵ This is not unlike any other feedback Rep. Hall received during the map-drawing process; some feedback he took, some he did not.⁶ And he testified about all feedback at his deposition. The sketched maps were limited in scope to a handful of specific areas in the state,⁷ and he never needed to use them in the public hearing room because they were “just a general idea of what districts may look like,” and he was not going to copy them.⁸ Rep. Hall testified that these sketches were electronic, and he

I wasn't just going in there blind.”); 137:23-138:12 (“time goes on you reach some of the more and more difficult draws in terms of time consumption and just again getting population grouping and when you get those I really needed some more help at that point, and you know when that was I'm going to say probably into the, well into the second week, I think when we would have started you know sort of having a more after game plan before I went in to draw.”).

⁴ *Id.* 114:11-19; 144:16-145:3 (“There was no election data none of the shading or anything of that nature on there.”); 153:21-154:3 (“I think part of your question sort of mischaracterized the situation. I never saw any election data at all. So I think you mentioned somehow something that could, your question in some way left open the door in my opinion that this could have been election data. I didn't see any election data.”); 154:23-155:7 (describing how staff understood that no election data would be used); 160:21-23 (“I did not consult any map with election or partisan data on it in drawing the maps that were enacted.”); 120:6-13 (“The staff knew what our criteria were and so there was no necessity to do that and I had no reason to believe that that's, that any election data was being considered.”).

⁵ *Id.* 116:15-23; 120:22-122:3; 122:14-123:15 (“Well, I think generally, but I, you know, what I did was essentially, you know, we would have, I would talk to staff about, you know, whatever grouping we were going to work on and, you know, if it was one that was going to be difficult or, you know, we were just running out of time, they would maybe work on, again, a concept, and but I, you know, it wasn't that I, you know, went in and just simply copied, you know, whatever could be September they had. You know, I just generally had in mind, you know, where the towns were and where the population might be in a given grouping, gave me some frame of reference to work off of and I, I think for anybody who's ever sat down and used the Maptitude software they'll understand that it is really difficult to go in in some of these groupings and just sit down and just draw from scratch without any sort of plan in place, and what can happen is you can easily sort of just get the map get the districts so jumbled up that they're not exact they're splitting municipalities and, you know, you're trying to obviously create the ideal population size. So it is a, it's a time-consuming process and especially when you're wanting to do it right and follow the criteria that we put forth.”).

⁶ *See, e.g., id.* 148:11-18 (“it wasn't something that I was going to go in and copy. It was just a general idea of what districts may look like.”).

⁷ *See id.* 125:10-130:4.

⁸ *Id.* 148:8-18.

has no copies of them.⁹ Both in deposition and through interrogatory responses, Rep. Hall made clear that these concept maps had minimal, if any, impact on the maps he ultimately drew himself at the public terminals at the legislature, and that these maps were not created using partisan or racial data to his knowledge.

Legislative Defendants have complied with all discovery obligations. They made Rep. Hall available to Plaintiffs for deposition and Plaintiffs questioned him exhaustively on this topic. Legislative Defendants also complied with this Court's December 27, 2021 Order on Harper Plaintiffs' First Motion to Compel on these discovery requests in providing complete responses to these requests before 9:00 AM EST the day after the order was entered. That Legislative Defendants cannot produce these concept maps does not merit sanctions; Rep. Hall was under no obligation to ensure that every piece of feedback he received during the map-drawing process—no matter how inconsequential—was reduced to paper and preserved in a vault for some future set of plaintiffs. The Court should deny *Harper* Plaintiffs' Motion.

BACKGROUND

On December 27, 2021, Rep. Hall sat for a deposition. During that deposition, Rep. Hall testified that he personally drew all of the House Map other than the Duplin-Wayne County districts, which Rep. Hall drew initially and were slightly changed by Rep. John Bell. Hall Tr. 102:24-103:18. He further testified that neither he nor his staff used or reviewed political data in the map drawing process. *Id.* 113:13-114:10. The focus of *Harper* Plaintiffs' consternation is Rep. Hall's testimony regarding certain concept maps for particular districts which Rep. Hall reviewed with staff late in the process of redistricting. *Id.* 115:15-23. Rep. Hall testified that the purpose of

⁹ *Id.* 147:14-20 (“Q And the concept maps that you were viewing, am I correct in saying that if you just printed one out you could have just brought into it the public hearing room and consulted it; is that correct? A I could have but I didn’t, I didn’t print anything and bring it in there.”); *id.* at 148:2-18.

these concept maps was to speed along the process of drawing the maps—**not** an intention to use partisan or racial data. *Id.* 120:22-121:21. Rep. Hall specifically testified that the purpose of these concept maps was to take concepts of keeping a city or college together in a map—in short, to ensure that he was able to follow the redistricting criteria within the limited time available to draw the maps. *Id.* 121:21-122:3; 122:23-123:15. Rep. Hall testified that these concept maps were prepared for “some of the more difficult draws,” *Id.* 125:6-10. Rep. Hall testified that concept maps were only consulted for a handful of identified districts, as follows:

- Pitt County Grouping: This county was difficult to draw due to efforts to avoid double-bunking the two incumbents there. *Id.* 125:10-13.
- Mecklenburg County Grouping: The intention was to draw maps similar to what had been approved by the Court in 2019, but Rep. Hall was ultimately uncertain whether there was a concept map he consulted, stating that “we really didn’t need to because we knew we were going to try to keep the districts the same” as what had been court-approved in 2019. *Id.* 126:6-127:10.
- Wake County Grouping: Due to the addition of two House districts, it was going to take a “long time” to draw these districts, especially since the addition of those districts made it “tough to really keep the districts very similar to what they were,” so concept maps were intended “to help [him] get it drawn in an efficient manner.” *Id.* 127:11-128:6.
- Forsyth-Stokes County Grouping: Rep. Hall’s goal was to keep this grouping as similar to the court-approved 2019 maps as possible, but the shifting of the grouping to include Stokes County made that more difficult to do efficiently. Rep. Hall believes the concept map “was nonconsequential to [him] in drawing that map.” *Id.* 128:19-130:4.

Despite Harper Plaintiffs' misleading use of the phrase "strategy sessions," these discussions were not to strategize on how to maximize partisan advantage, but rather to sketch out options about how to more efficiently draw the maps based on the criteria adopted by the legislature. *Id.* 124:24-25. Rep. Hall testified that in the limited number of times he even reviewed these sketches, they were on an electronic device belonging to Dylan Reel ("Mr. Reel"), who was serving as general counsel at the time; these sketches were not reduced to paper format and Rep. Hall kept no copies. *Id.* 123:16-18. Mr. Reel no longer is an employee of Rep. Hall (or the General Assembly). *Id.* at 214:21-23.

Following the conclusion of Rep. Hall's deposition, this Court entered an order requiring Legislative Defendants to respond by 9:00 AM EST the next day to *Harper* Plaintiffs' Second Set of Interrogatories and First Set of Requests for Production of Documents served on December 21, 2021. In its Order, this Court specified that "[n]othing in this Order shall be construed as a limitation on Legislative Defendants' ability to assert objections to the discovery requests, including any valid and available privilege assertions." Order on Harper Pltfs.' Mot. To Compel at p.5.

The next day, Legislative Defendants provided their responses to Harper Plaintiffs' Discovery Requests by 9:00 AM EST as required by the court's Order. Regarding the concept maps, these responses indicated the following:

- The concept maps were "to develop options for a limited number of districts in a limited number of county groupings **while complying with redistricting criteria.**" (emphasis added).
- The concept maps "did not dictate map drawing and often Defendant Hall ignored them altogether."

- Rep. Hall and Mr. Reel, “did not use any racial or political data in preparing these concept maps.”

Leg. Defs.’ Resp. to Harper Pltfs.’ Second Set of Interr. at p.6. Furthermore, Legislative Defendants stated that copies of the concept maps or related data are not in their possession, custody, or control. *Id.* at pp. 6-7. Dissatisfied with these responses, and with little notice to Legislative Defendants, *Harper* Plaintiffs filed the instant Motion.

The Court should decline *Harper* Plaintiffs’ request to divert party and judicial resources in pursuit of this red herring, as Legislative Defendants have complied with all discovery requirements including providing full and adequate responses to their Discovery Requests and making Rep. Hall available for seven hours of deposition.

ARGUMENT

A. Legislative Defendants have provided complete responses to Harper Plaintiffs’ Discovery Requests.

Harper Plaintiffs’ Motion to Compel is improper because Legislative Defendants have complied with their obligations pursuant to both the North Carolina Rules of Civil Procedure and the Court’s Order on *Harper* Plaintiffs’ First Motion to Compel. *Harper* Plaintiffs’ first interrogatory in their Second Set of Interrogatories ask Legislative Defendants to identify individuals who “took part in the drawing of the 2021 plans.” Legislative Defendants provided an extensive listing of legislators, legislative staff, and third parties responsive to this request. *Harper* Plaintiffs’ second interrogatory requests the identification of “all documents or data relied upon” by any person identified in the prior response. Legislative Defendants identified the publicly available data that was consulted along with an explanation of the concept maps described *supra* that Plaintiffs were already aware of through thorough examination of Rep. Hall under oath. Legislative Defendants also clarified that none of them, including Rep. Hall, have copies or records

of any concept maps Rep. Hall reviewed. Legislative Defendants have fully and completely responded to these interrogatories.

Contrary to *Harper* Plaintiffs' assertions, Legislative Defendants are not obligated to produce something they do not have possession, custody, or control of and that, to their knowledge, does not exist. *Progress Solar Sols., LLC v. Fire Prot., Inc.*, No. 5:17-CV-152-D, 2019 WL 4463302, at *8 (E.D.N.C. Sept. 17, 2019) ("Of course, the court cannot compel SMS and Long to produce documents that are not within their possession, custody, or control.") Legislative Defendants have searched for the concept maps that Rep. Hall testified he reviewed, but have been unable to locate any such materials. There is nothing further Legislative Defendants can, or are obligated to, do to obtain the documents *Harper* Plaintiffs are seeking. Obviously, however, the *Harper* Plaintiffs can seek these documents, if they exist, directly from Mr. Reel.

Harper Plaintiffs claim that Legislative Defendants have not disputed that these maps are relevant, but this is a premature conclusion by *Harper* Plaintiffs. As is customary in North Carolina legal practice, Legislative Defendants have reserved the right to object to relevance until the time of trial. Legislative Defs.' Responses to Harper Pltfs.' Second Set of Interr. at p. 2. However, as is apparent from Rep. Hall's deposition, these concept maps he reviewed were created by his then-staffer in an effort to make Rep. Hall's map-drawing more efficient as the map drawing process dragged on, rather than to implement any partisan intent. Any concept maps for the four county clusters identified in Rep. Hall's deposition were, at best, starting points based on various nonpartisan goals like avoiding double-bunking or maintaining court-approved districts. *See* Hall Tr. 213:20-214:8. Ultimately, the starting point Rep. Hall made for any grouping on the enacted map—the House map being challenged—has been produced via video and other documentation. Possible other starting points for drawing a grouping are not relevant. Accordingly, the relevant

documents are those that were produced by the Legislative Defendants in response to Harper Plaintiffs' First Set of Requests for Production of Documents, all of which are either publicly available or have been made available to the Harper Plaintiffs.

Ultimately, Harper Plaintiffs' Motion should be denied because Legislative Defendants have complied with their obligations under the Court's December 27, 2021 Order and, after good faith efforts to locate the concept maps discussed at Rep. Hall's deposition, have produced all documents in their possession, custody, or control that are responsive to Harper Plaintiffs' requests.

B. Sanctions are unwarranted where Legislative Defendants do not have possession, custody, or control of the documents at issue.

Harper Plaintiffs attempt to impose sanctions on Legislative Defendants based on claims of spoliation or failure to comply with the Court's prior Order on Harper Plaintiff's Motion to Compel is wholly unwarranted here for several reasons.

First, Legislative Defendants have complied with the Court's Order. As described above, Legislative Defendants provided complete responses to Harper Plaintiffs' Discovery Requests before 9:00 AM EST on December 28, 2021, and that was on the heels of an extensive deposition of Rep. Hall where Plaintiffs sought and received detailed information about these map sketches.

Second, there is no evidence that the concept maps are being withheld or have been lost or destroyed. The information is simply not in the Legislative Defendants' possession, custody, or control, and therefore they do not have the ability to produce it.

Third, the concept maps are not materially relevant to this litigation. Rep. Hall's testimony makes clear that he drew all maps himself on the public redistricting terminals, and did so without the use of partisan or racial data. Rep. Hall's review of concept maps for certain districts does not change these facts. Moreover, Rep. Hall's testimony was either equivocal about whether there

were any concept maps (e.g., he ultimately did not clearly recall reviewing a concept map for the Mecklenburg cluster, (Hall Tr. 126:6-127:10)) or did not consider them to be particularly influential, useful, or consequential, (*id.* 128:19-130:4;Leg. Defs.’ Resp. to Harper Pltfs.’ Second Set of Interr. at p.6).

Fourth, the Court can and should consider less punitive alternatives prior to drawing any adverse inferences. *See Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 2021-NCCOA-41, ¶ 31, 276 N.C. App. 95, 855 S.E.2d 819, 826 (“On appellate review, ‘where the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision.’” (quoting *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911, *aff’d per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006))). For example, the Court could order expedited discovery of Mr. Reel that would require disclosure of the concept maps, if they exist. Legislative Defendants should not be punished for *Harper* Plaintiffs’ failure to seek discovery through proper methods (i.e., subpoenaing Mr. Reel directly).

CONCLUSION

Legislative Defendants have provided the information sought by Harper Plaintiffs in their Discovery Requests as required by this Court’s December 27, 2021 Order, both through discovery responses and Rep. Hall’s deposition testimony. Legislative Defendants do not have the concept maps referenced in Rep. Hall’s deposition in their possession, custody, or control. This Court should therefore deny Harper Plaintiffs’ Motion.

Respectfully submitted, this the 29th day of December, 2021.

/s/ Phillip J. Strach

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CERTIFICATE OF SERVICE

It is hereby certified that on this the 29th day of December, 2021, the foregoing was served on the individuals below by email:

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